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Supreme Court of the United States

October Term, 1930.

No. 261

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

vs.

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

RUSSELL T. MOUNT,
Counsel for Petitioner.

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Supreme Court of the United States

STANDARD MARINE INSURANCE COMPANY, LTD., *Petitioner,* *vs.* SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD., *Respondent.*	No..... October Term, 1930.
IN THE MATTER *of the* Petition of the COLUMBIA STEAMSHIP COMPANY for Limitation of Liability, as owner of the Steamer LEONARD B. MILLER.	

PETITION FOR A WRIT OF CERTIORARI.

The petition of Standard Marine Insurance Company, Ltd., respectfully shows to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

This is a petition by Standard Marine Insurance Company, Ltd., for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review that Court's decree (p. 107) and opinion (pp. 108-111) which affirmed a final decree in admiralty of the United States District Court for the Northern District of Ohio,

Eastern Division (pp. 92-94). The District Court's decree had overruled the Special Commissioner's report (pp. 65-86).

The decree of the District Court, affirmed by the Circuit Court of Appeals, distributed between the petitioner and the respondent, two marine insurers of the same cargo of wheat on the *SS. Glenorchy*, both of whom had paid a total loss under their policies, the amount awarded to that cargo against the *SS. Leonard B. Miller*, the colliding vessel, in limitation of liability proceedings brought by the owners of the *SS. Leonard B. Miller*. In that collision, the *SS. Glenorchy* and the cargo in question sank and became a total loss.

Following the total loss, the respondent had paid the owner of the said cargo a total loss under its policy in the sum of $284,000. The petitioner had likewise paid the owner of the said cargo a total loss under its policy in the sum of $62,500. The total payment by both respondent and petitioner was thus $346,500. The amount recovered by the said cargo against the colliding vessel, the *SS. Leonard B. Miller* in the latter's limitation of liability proceedings was only $309,500. The special commissioner held that the two insurance companies, under their subrogated rights, were entitled to share *pro rata* in the $309,500, cargo's recovery against the *SS. Leonard B. Miller* (Paragraph 5, p. 71). It was this holding of the special commissioner which both lower Courts have reversed.

The final decree of the District Court (pp. 92-94), affirmed by the Circuit Court of Appeals (p. 107) directed that out of the $309,500 which represents cargo's recovery against the *SS. Leonard B. Miller*, the respondent, Scottish Metropolitan Assurance Company, Ltd., receive $284,000, the full amount it paid to the cargo owner,

with interest, and the petitioner, Standard Marine Insurance Company, Ltd., receive only the balance (after certain deductions) (pp. 93, 94).

The correctness of the holding of both lower Federal Courts on this point is the sole question raised by this petition.

There is no dispute as to the facts. The facts and the documents involved are stipulated in an agreed statement of facts which appears in the record (pp. 45-64). They are as follows:

By contract dated August 25, 1924, Louis Dreyfus & Company purchased from Canadian Co-Operative Wheat Producers, Ltd., of Winnipeg, for future delivery, 200,000 bushels of wheat, c. i. f. Montreal, at a c. i. f. price of $1.38½ per bushel (pp. 46, 66). These 200,000 bushels of wheat were insured by the seller Canadian Co-Operative Wheat Producers, Ltd., at $1.42 per bushel, making a total insurance taken out by the seller of $284,000 (pp. 46, 66). This insurance was evidenced by two certificates of insurance issued by the respondent to the seller dated October 26, 1924, each certificate covering 100,000 bushels, "valued at $1.42 per bushel. Shipped on board of the Steamer Glenorchy at and from Fort William and/or Port Arthur to Montreal" (pp. 47, 66, 67; Exhibits D and E, pp. 59-63). The valuation in said certificates was 3½ cents above the c. i. f. price. These certificates were delivered with the bills of lading to Dreyfus & Company, the buyer.

The 200,000 bushels of wheat were shipped by Canadian Co-Operative Wheat Producers, Ltd., on the *SS. Glenorchy* at Port Arthur, bound for Montreal, on October 27, 1924, and constituted the greater part of that vessel's cargo.

On October 29, 1924, the *SS. Glenorchy,* with the above cargo on board, was in collision with the *SS. Leonard B. Miller,* as a result of which the *SS. Glenorchy* and her cargo sank and became a total loss (pp. 45, 65). In limitation of liability proceedings filed in the District Court by Columbia Steamship Company, as owner of the *SS. Leonard B. Miller* (pp. 2-7), both vessels were held at fault, and Louis Dreyfus & Company were awarded recovery against the *SS. Leonard B. Miller.* The amount of that recovery was $322,487.65, being based on the market value of the wheat at Port Arthur, the port of loading on the day of loading, at $1.54¼ per bushel (pp. 10-12, 48). This limitation of cargo's recovery against the *SS. Leonard B. Miller* was necessitated by the rule laid down by this Court in *The Vaughan and Telegraph* (1871), 14 Wall. 258, at pp. 267, 268.

The subject-matter of the present dispute between the two insurance companies is the 200,000 bushels, above referred to, the recovery for which, in the final decree, is $309,500 (part of the $322,487.65).

Dreyfus & Company was a buyer of grain and as it could not compel its sellers to cover cargoes by insurance to a greater amount than the c. i. f. *contract price, Tanvaco* v. *Lucas* (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296, and as in all probability the *actual value* of wheat on shipment and during the lake voyage would exceed the c. i. f. price, Dreyfus & Company had prior to the date of the sale contract in question arranged with the petitioner for insurance on such increased value. The petitioner had accordingly, on July 12, 1924, issued to Louis Dreyfus & Co. its open policy of marine insurance (pp. 23-32). This policy provides for the coverage of two kinds of cargo. Clause 4 of the

policy (p. 30) provides for the coverage of cargo which has *not* been insured by the shipper. Clause 3 (see rider on policy, pp. 27, 28) provides for the coverage of cargo which *has* been insured by the shipper.

The amount of the coverage on shipments which have been insured by the shipper is described in Clause 3 (as amended by rider dated August 1, 1924), as follows:

> "To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE,' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents), as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day of the final delivery of the complete cargo at destination as named in the Certificate, both days inclusive; and in the event of casualty to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the 'New York Journal of Commerce' between the day of sailing of the vessel at point of shipment, and the day the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the Company, 64 King Street East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable."

The $62,500 paid by the petitioner to Louis Dreyfus & Company was in fact due from it to Dreyfus & Company under its policy (pp. 48, 69), and was arrived at as follows:

Highest market value on October 27th, $1.64¾ per bushel, plus 5 cents	$	1.69¾
C. I. F. invoice value per bushel		1.38½
Increased value per bushel	$	.31¼

200,000 bushels at 31¼ cents per bushel ... $62,500.00 (p. 69).

After entry of final decree in the limitation of liability proceedings, both petitioner and respondent filed petitions of intervention for their interests, by subrogated rights, in the fund represented by the bond or stipulation for value of the *SS. Leonard B. Miller.*

To make the matter clear, it is necessary to point out the various prices and/or values of the cargo per bushel, as follows:

Invoice *price,* fixed by contract of August 25, 1924	$1.38½ per bu.
The *valuation* agreed on in the shipper's insurance under its open policy with the Scottish Metropolitan Co.	1.42 " "
The *actual market value* of the wheat *at the port of shipment* on October 27, 1924, the date of shipment, two months after the date of contract of sale	1.54¾ " "
The above *market value* at port of shipment was 16¼ cents above the contract *price.*	
The *market value,* as quoted in the New York Journal of Commerce on October 29, 1924	1.64¾ " "
Add $.05 to the above, as per clause 3 of petitioner's policy	1.69¾ " "
The amount of Dreyfus & Company's "increased value" insurance on the cargo ($1.69¾ less $1.38½)	.31¼ " "

The petitioner's insurance was insurance on cargo, and on actual value thereof. The petitioner's policy, copy of which appears at pp. 23-32 of the printed record, bears the words, "Lake Cargo" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce laden on board the good vessel or vessels, etc." (p. 23);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (p. 23). (Italics ours.)

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price. As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep shipments of grain, made to them under c. i. f. contracts, fully covered by insurance.

Both lower courts have treated the petitioner's insurance as though it were insurance, not on cargo, but on the cargo owner's ability to collect up to $1.69¾ per bushel from a wrongdoer.

There is no connection between the law, established by this Court, which limits the amount of recovery for totally lost cargo against a wrongdoing vessel, and the rights of cargo underwriters by way of subrogation to the fund representing that recovery.

B.

Reasons Relied on for the Allowance of the Writ.

The decision in the present case is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.), 152 Fed. 411, where that Court held that where Underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share *pro rata* with other underwriters in the fund recovered from the wrongdoer.

In that case, the *SS. City of Kingston* was insured by various insurance companies against all risks under separate policies, in each of which the vessel was valued at $75,000. Two other insurance companies issued to the owners of the *SS. City of Kingston* two policies aggregating $12,200 "on disbursements and/or increased value," the insurance being against total loss only and warranted free from all average and salvage charges, and containing a policy proof of interest clause. In addition to all of the above policies the St. Paul Fire & Marine Insurance Company insured the vessel in the sum of $4,800 against total loss only, no valuation being inserted in that policy.

During the pendency of all of the above policies, the *SS. City of Kingston* was in collision with the *SS. Glenogle,* and was sunk. All of the underwriters on hull, together with the St. Paul Fire & Marine Insurance Company, paid a total loss and at the request of these underwriters the owner of the *SS. City of Kingston* brought suit to recover damages from the owners of the *SS. Glen-*

ogle. On the trial, the Court found the actual value of the *SS. City of Kingston* was $140,000, that both vessels were in fault, and decreed division of damages. The result was that $67,472.96 was paid into court for the owners of the *SS. City of Kingston.* After payment of costs of the suit, the net amount left in the registry of the court was $47,426.97, for distribution among the insurance companies who were entitled to receive the same.

At this point, the two insurers "on disbursements and/or increased value" intervened, alleging that they had paid a total loss and were entitled to share *pro rata* with all the other underwriters in the fund in court. The District Court sustained this position and made *pro rata* distribution of the funds to all the underwriters.

On appeal the decision was affirmed, the Circuit Court of Appeals expressly overruling the contention of the hull underwriters that because they had insured the *SS. City of Kingston* in the sum of $75,000 in policies which valued her at that sum, they were entitled to be subrogated to that amount in the award to the owner of the *SS. City of Kingston,* and the contention that the insurers on "disbursements and/or increased value" were not entitled to share in the fund.

At page 413, the Circuit Court of Appeals said:

> "The assured in the policies issued by the appellees was in fact the owner of the property insured, and could undoubtedly have recovered on the policies. Such being the case, we are unable to discover any recognized principle of law or equity on which it should be held that the appellees are not entitled to rank equally with the other underwriters in the distribution of the fund in court."

The award to the insurers on "disbursements and/or increased value" was $4,132.92 (p. 412). The calculation of that award, although not worked out in the opinion, is necessarily as follows:

Valued hull policies	$ 75,000.00
Disbursements and/or increased value insurance	12,200.00
Unvalued hull policies	4,800.00
Owner, co-insurer for	48,000.00
The total interests in the vessel	$140,000.00

There was $47,426.97 for distribution.

The disbursements and increased value insurance received

$$\frac{12,200}{140,000} \times \$47,426.97 = \$4,132.90$$

If in the present case of *The Glenorchy*, the same law and the same method of calculation had been applied, the result would be:

Valued policy of Scottish Company	$284,000.00
"Increased value" policy of Standard Company	62,500.00
Total interests in the 200,000 bushels of wheat	$346,500.00

There is $309,500 for distribution.

The "increased value" insurance should receive

$$\frac{62,500}{346,500} \times \$309,500 = \$55,826.10.$$

Under the decree of the Circuit Court of Appeals as it now stands, the petitioner will receive only about $24,000.

In addition to the conflict in the decisions of the Sixth and Ninth Circuits, as to the basis on which "increased value" insurance shares by subrogated right in the fund recovered by the assured from the wrongdoer, *certiorari* is requested in this case on the further ground that the case involves a question of marine insurance of great importance, to all sellers, buyers and insurers of c. i. f. shipments, particularly that very great volume of c. i. f. shipments of grain on the Great Lakes, which question it is respectfully submitted should be settled by this Court.

Purchasers of grain under c. i. f. contracts cannot compel the sellers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. The purchasers do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract,—in the present case the shipment not being made until two months after the date of the contract. As therefore, *the actual market value* of the grain, when it becomes the property of the purchaser on shipment some time after the contract of sale, is in excess of the c. i. f. price, the only way by which the purchaser can keep his cargo covered up to its actual market value, is to take out insurance based on "increased value". There is nothing speculative in such insurance.

The present case involves a question affecting not only the enormous grain trade on the Great Lakes, but also the grain trade and other trades involving shipments either to or from American ports made under c. i. f. contracts.

It is respectfully submitted that the important question of marine insurance involved in this case should be settled by this Court, not only on the ground of its importance, but also on the ground of conflict between the decisions of the Sixth and the Ninth Circuits.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its docket No. 5352, *Standard Marine Insurance Company, Ltd.*, v. *Scottish Metropolitan Assurance Company, Ltd.*, and that the said decree of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

STANDARD MARINE INSURANCE COMPANY, LTD.,
By RUSSELL T. MOUNT,
Counsel for Petitioner.

Supreme Court of the United States

STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

against

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

No.....
October Term, 1930

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division (89-91) rendered under date of July 18, 1928, is reported in 28 Fed. (2nd) 540.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (108-111) rendered under date of April 7, 1930, is reported in 39 Fed. (2nd) 436.

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Sixth

Circuit, affirming the decree of the District Court, is April 7, 1930 (p. 107).

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and involves a question of maritime insurance.

3. The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and under Article 3, section 2 of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case has been necessarily given under heading A in the petition, a restatement of the case is omitted here in the interest of brevity.

IV.

Specification of Errors.

The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the petitioner was not entitled to share *pro rata* with the respondent in the fund of $309,500, the amount of the recovery awarded to Dreyfus & Company as owner of 200,000 bushels of wheat lost on the *SS. Glenorchy,* sunk in collision with the *SS. Leonard B. Miller,* and in holding that the respondent should receive full reimbursement of $284,000 from the said fund of $309,500, and that your petitioner was only entitled to receive the balance of such fund after such payment in full of $284,000 to the respondent.

V.

Argument.

FIRST POINT.

The petitioner's insurance was insurance on cargo and on actual value thereof. It was not insurance on profits.

The Standard Company's policy, copy of which is annexed to the amended petition of the Standard Company (Schedule A, pp. 23-32), bears the words "LAKE CARGO" on the upper left-hand corner of the first page.

The first paragraph of the policy reads:

> "Do make insurance and cause * * * to be insured upon all kinds of Lawful Goods, Wares, Merchandise and Produce laden on board the good vessel or vessels, etc." (p. 23);

and the second paragraph of the policy reads:

> "Beginning the adventure *upon the said property*, etc." (p. 23). (Italics ours.)

The Standard Company's policy provides for the coverage of two kinds of cargo: First, cargo which has *not* been insured by the shipper, and, second, cargo which *has* been insured by the shipper. Typewritten clause 4 of the policy (p. 30) provides the amount of the insurance coverage on shipments which have not been insured by the shipper, such shipments to be valued at an amount to be declared prior to sailing. That clause reads as follows:

"To cover all shipments of grain owned by the assured, or in which the assured may have an interest and *not insured by the shipper*, such shipments to be valued, for the purposes of this insurance, at amount declared, such amount declared and advices of such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter prior to sailing of the vessel" (pp. 30, 68). (Italics ours.)

Typewritten clause 3 (endorsement, dated August 1, 1924, pp. 27, 28), provides for the amount of coverage on shipments which *have* been insured by the shipper (that is c. i. f. shipments). Clause 3 reads:

"To cover 'INCREASED VALUE' on grain owned by the Assured or in which the Assured may have an interest, such 'INCREASED VALUE' for the purposes of this insurance, to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce, between the day of sailing of the vessel at point of shipment and the day of final delivery of the complete cargo at destination as named in the certificate, both dates inclusive; and in the event of casualty, to be valued at the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5¢ (Five Cents) as set out in the New York Journal of Commerce between the day of sailing of the vessel at point of shipment, and the day and the final delivery of the complete cargo would have arrived at destination if casualty had not occurred, both days inclusive. Advice of all such shipments to be mailed to the company, 64 King Street, East, Toronto, Ontario, Canada, by registered letter on day of sailing of the vessel, or as soon thereafter as practicable" (pp. 27, 28).

The use of the words "increased value" in clause 3 of the policy was necessary to properly describe the *amount* of the coverage where the shipper had, under its c. i. f. contract, taken out insurance to the extent of the c. i. f. price.

The differing provisions of clause 4 and clause 3 of the Standard Company's policy do not change the *kind* of insurance; they simply provide for a different *amount* of the same kind of insurance. *i. e.*, insurance on cargo. The Commissioner pointed this out at the bottom of page 83 of the record.

Dreyfus & Company, engaged in the business of purchasing grain under c. i. f. contracts, cannot compel the sellers and shippers of such grain to insure it for more than the c. i. f. price. *Tanvaco* v. *Lucas*, (1861) 30 L. J. (N. S.) 234; affirmed (1862) 31 L. J. (N. S.) 296. Moreover, Dreyfus & Company do not know with what company the sellers carry their insurance. The grain is not shipped until some time after the date of the c. i. f. contract. In the present case the grain was not shipped until two months after the contract. As, therefore, the *actual market value* of the grain, when it becomes the property of Dreyfus & Company on shipment some time after the date of the contract of sale, is in excess of the c. i. f. *price*, Dreyfus & Company carried the open policy with the petitioner for insurance on this "increased value." As Dreyfus & Company could not call on the seller to insure for more than the c. i. f. price, Dreyfus & Company's insurance with the petitioner on "increased value" was the *only way* whereby Dreyfus & Company could keep shipments of grain, made to them under c. i. f. contracts, fully covered by insurance.

If Dreyfus & Company had been both shipper and consignee, Dreyfus & Company could, as the value of wheat increased, have arranged with their insurer to increase the valuation in its policy; the insurance would then have been in one company, and following the sinking of the cargo that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the increase in value of the wheat cannot change the fact that both insurances were on cargo.

The market value on October 29, 1924, $1.64¾, was not a value quoted at either port of shipment or port of delivery, but was the market value quoted in the New York Journal of Commerce. This market value was 26¼ cents *in actual value* above the contract *price.* The additional 5 cents, which made up the valuation and limit of coverage in the petitioner's policy, was obviously to provide for a slight margin in case there was a slight error between the New York *quotation* and the *actual market value* of the cargo en route to Montreal. It should be noted that this 5 cents was 3 per cent. of the market value as quoted in the New York Journal of Commerce, and does not make the insurance speculative, any more than the additional 3½ cents above the c. i. f. price (3½ cents is 2½ per cent. of the c. i. f. price) in the respondent's policy makes that policy speculative.

That the petitioner's insurance on Dreyfus & Company's cargo was insurance on actual value, is perfectly clear if we assume that Dreyfus & Company were going

to use the cargo to fill a contract for export shipment from Montreal. Assuming that such was the case, then Dreyfus & Company, on the loss of the *Glenorchy* on October 29, 1924, would be obliged to replace the lost cargo, and in purchasing another cargo to replace the lost cargo, Dreyfus & Company would be obliged to pay the then market value of grain, which market value according to the quotation in the New York Journal of Commerce was $1.64¾ per bushel. There can be no doubt that that was the *minimum* actual market value of the grain on the date of the loss, and that at least that much would have had to be paid to replace the cargo which was lost. *The grain could not be replaced at the c. i. f. contract price of August 25, 1924.*

The Courts below erred in reasoning that because the valuation in the petitioner's policy was a figure greater than the value at the point of shipment, whereas the award to Dreyfus & Company, as owner of the cargo, against the *SS. Leonard B. Miller* was limited by law to the market value at the point of shipment, the petitioner's insurance was not on the cargo but on the price at the point of delivery; and that, therefore, the petitioner did not have an equal right of subrogation with the respondent.

The limit of legal recovery in favor of the cargo owner against the *SS. Leonard B. Miller* has been fixed by decisions of this Court and the lower Federal Courts as the market value at the point of shipment on the day of shipment, plus the expenses of getting the cargo to the point of sinking. *The Vaughan and Telegraph* (1871), 14 Wall. 258, 267; *The Ocean Queen* (1867, C. C.

S. D. N. Y.), 5 Blatch. 493; *The Aleppo* (1874, D. C. S. D. N. Y.), 7 Ben. 120, 129, 130; *The Oceanica* (1907, D. C. W. D. N. Y.), 156 Fed. 306, 307. There is, however, no connection between that rule of law, which limits the amount of recovery against a wrongdoing vessel, and the rights of subrogation to the fund representing that recovery.

As Dreyfus & Company, in order to replace the lost cargo would have to pay at least $1.64¾ per bushel, it seems clear that certainly up to that amount, even if not to the full $1.69¾, the petitioner's policy was insurance on *actual value* of the wheat. The fact that the value on delivery at Montreal would probably have been approximately the same as the value *en route,* does not make the petitioner's policy insurance upon the price on delivery. Certainly the spread between $1.38½ (the c. i. f. price) and $1.54¾ (the market value at Port Arthur) had nothing whatever to do with the price on delivery.

The holding of the lower Courts in this case amounts to this:

Suppose goods worth $200,000, insured by the shipper under a c. i. f. contract for $150,000 in insurance company A, and insured by the purchaser for $50,000 on increased value in insurance company B, are totally destroyed in transit and the carrier is liable, but because of the bill of lading valuation clause the recovery against the carrier is limited to $100,000. The lower Courts on their reasoning would hold that insurance company B had no subrogated rights to the fund recovered against the carrier, because the owner of the goods could not recover against the carrier more than $100,000. That proposition is clearly untenable.

It therefore seems clear that the petitioner's insurance on increased value was insurance *on the cargo*, and on the *actual value* of the cargo, which value was of course greater than the contract price of August 25, 1924, two months earlier. The petitioner's insurance was not insurance on the price at the point of delivery, but was insurance on the value of the cargo day by day as a cargo *en route* to Montreal.

The fact that the respondent's certificates of insurance stated the valuation of the 200,000 bushels as $284,000 merely means that the respondent's limit of liability in case of total loss was $284,000; just as the valuation in the petitioner's policy means that the petitioner's limit of liability in case of total loss was the difference between the c. i. f. price and the highest market price, plus five cents, as quoted in the New York Journal of Commerce between the day of sailing and the day the cargo would have arrived at destination if casualty had not occurred. The Courts below apparently felt that the valuation in the respondent's policy gave it a prior right of subrogation over the petitioner, but it is clear that in both policies the valuation merely fixes the maximum liability in case of total loss.

In the decision of this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.* (1929), 279 U. S. 708, Mr. Justice STONE, in delivering the opinion of the Court, said at page 712:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a *stipulation*, in effect, that *for purposes of computation of the insurance liability* the cargo shall be taken at an agreed value." (Italics ours.)

Nor was the petitioner's policy insurance on profits. In the Courts below, the respondent argued that the insurance provided for in Clause 3 of the petitioner's policy was insurance "on profits", and cited *Canada Sugar Refining Co.* v. *Insurance Co. of North America,* (1900), 175 U. S. 609. It should be pointed out that in that case the policy expressly described the insurance as "$15,000 *on profits* on cargo sugar; against total loss only; valued at the sum insured" (p. 613). That case and the other cases involving insurance on profits—*The Patapsco Insurance Co.* v. *Coulter,* 3 Peters, 222, and *O'Brien* v. *North River Insurance Co.* (1914 C. C. A. 4 C) 212 Fed. 102, all point out that insurance on profits, although legal, is *speculative insurance,* there being no burden on the assured in case of loss to show that there was in fact any market at the point of destination.

There was nothing speculative about the insurance provided for in Clause 3 of the petitioner's policy. The amount of insurance provided by that clause was based on *real value,* and actually fluctuated up and down according as the New York quotation of the market increased or decreased. No method of arriving at a valuation could more closely approximate *actual value* than the provision in Clause 3 of the petitioner's policy.

In its brief in the Circuit Court of Appeals the respondent cited the English case of *Strass* v. *Spillers & Bakers, Ltd.* L. R. (1911) 2 K. B. 759, and quoted from the opinion in that case certain language to the effect that policies on increased value are not the *ordinary kind* of cargo policies. The case, however, does not hold that policies on increased value are not cargo policies, but to the contrary the facts stated in the opinion show that

the policies on increased value on a cargo of grain were paid their proportion of loss as were the usual form of cargo policies, the only question decided being who was entitled to the amounts paid under the increased value policies. The facts were that by contract dated December 30, 1908, the defendants brought from Dewar & Webb a cargo of wheat c. i. f. the contract providing "seller to give policies of insurance (free of war risk) for 2% over the invoice amount, and any amount over this to be for seller's account, in case of total loss only". On February 2, 1909, the plaintiff by contract in similar terms purchased from Messrs. Allatini a cargo of wheat of the same crop per the sailing ship *Leon Bureau* and received from Messrs. Allatini a policy on the cargo for £21,300 dated February 16, 1909. The market price of wheat having risen since February 2d, the plaintiff on February 9th effected a policy on increased value of the wheat for £2000 with the London Assurance Corporation and a second increased value policy on February 27 for £2000 with the British & Foreign Marine Insurance Co. These increased value policies were without benefit of salvage and were warranted free from average unless general, or the ship be stranded.

On March 16, 1909, the plaintiff re-sold the cargo to Messrs. Allatini at an increase in price and on the same day Dewar & Webb bought the cargo from Messrs. Allatini in order to fulfill their contract of December 30, 1908, with the defendants. In view of the increase in contract price, the plaintiff was obliged to hand to Messrs. Allatini on re-sale to them additional insurance to the extent of £1508. He therefore had the increased value policy of the British & Foreign Marine Insurance Company divided into two policies of £1508 and £492 and handed

to Messrs. Allatini the policy for £1508, retaining the one for £492 as well as the increased value policy for £2000 effected with the London Assurance Corporation.

On the voyage the carrying vessel struck a rock and had to be beached, and in consequence the cargo sustained a particular average and a general average loss. Adjustment was made and the losses were paid on the policies handed over to Dewar & Webb and by them handed over to the defendants, but these policies did not include the two retained by the plaintiff, namely, the increased value policies for £2000 and £492, respectively.

Subsequently, the plaintiff sent those two policies to Messrs. Allatini to be sent by them to the receivers of the cargo for presentation to the adjuster; and following this, the underwriters paid to the defendants under those policies £524 and £128, respectively; and the defendants refused to turn those amounts over to the plaintiff.

The Court pointed out that because of the particular terms of the two policies in question they were "not in the ordinary sense a mere insurance on cargo; and to pay in case of general average not *pari passu* with all other portions of the cargo and all *other policies on cargo*, but only in a particular way; it is warranted free from particular average; and finally it is without benefit of salvage" (p. 768).

The Court did not hold that the "increased value" policies were not insurance on cargo. All it held was that the two policies in question belong to the plaintiff and not to the defendants, and it should be noted that the "increased value" policy for £1508, which was not the subject of suit, but which had been handed to the defendants together with the *other policies on cargo*, re-

ceived its share of loss payment with the *other cargo policies*. The two "increased value" policies which were the subject of the suit likewise were paid by the underwriters as cargo policies. The only question decided by the case was the person entitled to the proceeds of those two particular "increased value" policies.

The respondent also cited in the Court below the case of *Loders and Nucoline, Ltd.*, v. *The Bank of New Zealand* (1929, Kings Bench Division) reported only in 33 Lloyd's List Law Reports 70. All that case held was that under a c. i. f. contract for the sale of copra, which called for insurance by the seller in the sum of £8587/10 the seller did not fulfill his obligation by tendering to the buyer policies on cargo to the extent of £7612/10 and additional policies for £975 on "freight payable at destination", merely by having the last mentioned policies worded:

> "on freight payable at destination, being increased value of copra through payment of freight or from such time as freight becomes due at destination, this insurance being deemed to be part of the total amount insured on the copra valued at such total amount."

The vessel was lost on the voyage, and as the freight was not due by the bills of lading until delivery at destination, the buyers were not able to collect from insurers on the £975 on "freight payable", and the sellers were therefore held liable to make good this deficiency of insurance. There is nothing in that case which bears on the present case.

SECOND POINT.

Where underwriters have paid the insured a total loss under their policies, the underwriters on "increased value" share pro rata with other underwriters in the fund recovered from the wrongdoer. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.*, 152 Fed. 411.

We have already pointed out at page 18 that if Dreyfus & Company had been both shipper and consignee, they could, as the value of wheat increased, have arranged with their insurer to increase the amount of its policy; the insurance would then have been in one company, and following the sinking of the cargo, that insurance company would have been subrogated to the cargo's rights against the *SS. Leonard B. Miller.* The fact that, from the necessity of the case, Dreyfus & Company were obliged to take out insurance in another company to cover the actual increase in market value of the wheat on its becoming their property, cannot change the fundamental principle of subrogation, viz.: in the case of a single insurer, it steps into the shoes of the assured vis-a-vis the wrongdoer; if more than one insurer covers the property they *jointly* step into the shoes of the assured vis-a-vis the wrongdoer. In the supposed instance, the single insurance company would have had the entire rights of subrogation against the *SS. Leonard B. Miller;*

in the actual facts of this case, the two insurance companies are jointly subrogated to those rights.

This is true not only as a matter of principle, but as a matter of law. This was specifically held in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd., et al.* (1907 C. C. A. 9 C.), 152 Fed. 411. As the *Brown* case is fully discussed at pages 8-10 of the accompanying petition, the digest of its facts is not here repeated.

If the basis of *pro rata* sharing by "increased value" insurance laid down in the *Brown* case is applied in the present case, the petitioner will receive approximately $55,000 instead of approximately $24,000.

CONCLUSION.

It is respectfully submitted that in view of the importance of the question of marine insurance involved in this case, and in view of the conflict between the present decision and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Brown et al.* v. *Merchants Marine Insurance Co., Ltd.*, a writ of certiorari should be granted so that this Court may review the decision of the United States Circuit Court of Appeals for the Sixth Circuit.

RUSSELL T. MOUNT,
Counsel for Petitioner.